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OFFICE OF THE SECRETARY



**Building The  
Wireless Future™**

**CTIA**

Cellular  
Telecommunications  
Industry Association  
1250 Connecticut  
Avenue, N.W.  
Suite 200  
Washington, D.C. 20036  
202-785-0081 Telephone  
202-785-0721 Fax

EX PARTE OR LATE FILED

August 11, 1997

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

**Re: Ex Parte Filing**  
(Docket # 95-116 - Number Portability)

Dear Mr. Caton:

On August 11, 1997, the Cellular Telecommunications Industry Association ("CTIA"), filed with Chairman Reed Hundt the attached *ex parte* letter regarding Number Portability Cost Recovery.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

  
Wendy Chow

Attachment

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List ABCDE





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## CTIA

Cellular  
Telecommunications  
Industry Association  
1250 Connecticut  
Avenue, N.W.  
Suite 200  
Washington, D.C. 20036  
202-785-0081 Telephone  
202-331-8112 Fax  
202-736-3213 Direct Dial

**Thomas E. Wheeler**  
President / CEO

August 11, 1997

The Honorable Reed E. Hundt, Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, DC 20554

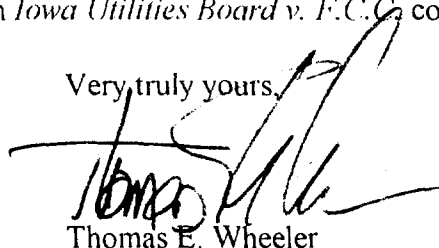
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Dear Chairman Hundt:

Several issues regarding the Commission's authority with respect to the wireless industry will be significantly affected by the decision on Interconnection recently issued by the Eighth Circuit U.S. Court of Appeals. An issue of pressing concern is the Commission's pending decision regarding cost recovery for number portability. CTIA understands that the Commission is contemplating a plan which would allow the States to determine the recovery method for carrier-specific costs directly related to providing number portability (e.g., costs to purchase the switch software implementing number portability). The Eighth Circuit's decision regarding LEC-CMRS interconnection, however, precludes the Commission from allowing the States to regulate this aspect of interconnection pricing for wireless carriers.

The Court of Appeals' decision confirmed the Commission's plenary authority, under Section 332, over CMRS rates and entry in general, and over LEC-CMRS interconnection in particular. Given the interstate nature of wireless services and the clear authority of the Commission to regulate CMRS rate and entry regulation, it is inappropriate for the States to regulate rates for CMRS number portability cost recovery. Rather, the Eighth Circuit has made clear that number portability cost recovery for CMRS must be established by the Commission. Attached is a memorandum that addresses in depth how the court's decision in *Iowa Utilities Board v. F.C.C.* compels this outcome.

Very truly yours,



Thomas E. Wheeler



**EFFECTS OF THE EIGHTH CIRCUIT'S DECISION IN *IOWA UTILITIES BOARD v. FCC* ON WIRELESS NUMBER PORTABILITY**

**INTRODUCTION**

The United States Court of Appeals for the Eighth Circuit, in its recent decision on the Federal Communications Commission's ("Commission") Order on Interconnection, clearly establishes that Section 332 of the Communications Act provides the Commission with unique and exclusive jurisdiction over CMRS rates and entry.<sup>1</sup> The court interprets Section 332 of the Act as granting the Commission broad authority to preempt interstate rate and entry regulation for CMRS providers. This interpretation reveals two notions critical to the Commission's future decision-making with regard to issues affecting CMRS. First, the court establishes that Section 332's grant of authority over CMRS rate and entry regulation is expansive and should be interpreted to encompass rates established between telecommunications carriers as well as carrier-to-customer rates. Second, Section 332 plays the paramount role in governing CMRS rate and entry regulation notwithstanding subsequent passage of the 1996 Telecommunications Act and preexisting strictures of Section 2(b).

The Court of Appeals' decision has confirmed the Commission's plenary authority over CMRS rates and entry in general, and over LEC-CMRS interconnection in particular. This memorandum addresses how the decision in *Iowa Utilities Board v. F.C.C.* affects the Commission's decisions regarding cost recovery for number portability for CMRS providers, and concludes that, under this decision, the Commission must exert Federal jurisdiction over local number portability cost recovery for CMRS providers.

**BACKGROUND**

Section 251 of the 1996 Telecommunications Act requires all local exchange carriers ("LECs") to offer number portability in accordance with requirements prescribed by the Commission.<sup>2</sup> Number portability is defined as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."<sup>3</sup>

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<sup>1</sup> See *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. July 18, 1997).

<sup>2</sup> 47 U.S.C. § 251(b)(2).

<sup>3</sup> See 47 U.S.C. § 153(30). The Commission defines three types of number portability: (1) service provider - the ability to retain one's number when changing service providers; (2) service - the ability to retain one number when changing services; and (3) location - the ability to retain one's number when changing physical locations. Telephone Number

Pursuant to the statutory directive to promulgate national number portability requirements, the Commission established performance criteria that any long-term number portability method selected by a LEC must meet and set forth a phased deployment schedule for implementing number portability.<sup>4</sup> Although the statute explicitly excludes CMRS providers from the definition of local exchange carriers, and therefore from the section 251(b) obligations to provide number portability, the Commission concluded that it had independent authority under Sections 1, 2, 4(i) and 332 of the Act to require CMRS providers to provide long-term service provider portability.<sup>5</sup> Due to unique characteristics associated with wireless number portability, however, CMRS providers are required to implement number portability after the wireline systems have already implemented number portability. Specifically, whereas the wireline carriers must begin implementing number portability no later than October 1, 1997, unless extended by the Commission, CMRS carriers must have the capability of querying the appropriate number portability databases in order to deliver calls from their networks to ported numbers by December 31, 1998, and must offer service provider portability throughout their networks by June 30, 1999.

In addition to establishing performance criteria and implementation schedules for wireline and wireless number portability, the Commission issued a Further Notice of Proposed Rule Making on the appropriate cost recovery mechanisms for long-term number portability. In its Further Notice, the Commission tentatively concluded that three types of costs are involved in providing long-term service portability: (1) costs incurred by the industry as a whole (*e.g.*, those incurred by the third-party administrator to build, operate, and maintain the databases needed to provide number portability); (2) carrier-specific costs directly related to providing number portability (*e.g.*, costs to purchase the switch software implementing number portability); and (3) carrier-specific costs not directly related to number portability (*e.g.*, costs of network upgrades necessary to implement a database method).

CTIA understands that the Commission is contemplating a cost recovery plan which would allow the States to determine the cost recovery method for Type 2 costs (*i.e.*, carrier-specific costs directly related to providing number portability). The Eighth Circuit's decision regarding LEC-CMRS interconnection, however, precludes the Commission from allowing the States to regulate this aspect of interconnection.

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Portability, *Notice of Proposed Rule Making*, 10 FCC Rcd 12350, 12355-56 (1995). Only service provider portability is required at this time.

<sup>4</sup> Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rule Making*, CC Docket No. 95-116, FCC 96-286 (1996) ("Number Portability Order").

<sup>5</sup> *Id.* at ¶ 153.

## LEC-CMRS INTERCONNECTION

Although the Court of Appeals vacated significant portions of the Commission's Interconnection Order<sup>6</sup> on the grounds that the Commission had exceeded its jurisdiction in setting rates for LEC interconnection, the court preserved the Order's "rules of special concern to the CMRS providers."<sup>7</sup> The court determined that Congress expressly created an exemption for the Commission's regulation of CMRS providers in Section 332 and Section 2(b)<sup>8</sup> of the Act. The court reasoned that since the Section 2(b) reservation of authority to the States does not apply to CMRS, the Commission, not the States, has the sole authority to establish interconnection pricing rules between LECs and CMRS providers.<sup>9</sup> The court first observed that Congress amended Section 2(b) to give the Commission jurisdiction over entry and rates charged by CMRS providers. Moreover, the court recognized that Congress provided express Commission authority to regulate LEC-CMRS interconnection under Section 332(c)(1)(b).<sup>10</sup> Thus, the court concluded that federal regulation of CMRS rates and entry is a function of the Commission's plenary authority over communications by wire and communications by radio and not subject to the rigors of a Section 2(b) analysis.<sup>11</sup>

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<sup>6</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("Interconnection Order").

<sup>7</sup> *Iowa Utilities Board* at n.21. These regulations establish symmetrical reciprocal compensation pricing arrangements for transport and termination of traffic between LECs and CMRS providers; allow CMRS providers to renegotiate existing, nonreciprocal transport and termination arrangements; and bar LECs from assessing charges for traffic that originates on their networks.

<sup>8</sup> Section 2(b) provides that, subject to particular exceptions, nothing in the Communications Act shall grant the Commission jurisdiction to regulate, *inter alia*, "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b).

<sup>9</sup> *Iowa Utilities Board* at n.21.

<sup>10</sup> *Id.*

<sup>11</sup> The court engages in an extensive analysis of Section 2(b) in vacating the Commission's pricing provisions. Because the court's decision is based almost entirely upon the results of the Section 2(b) analysis, the court's exemption of Section 332 from 2(b)'s application is of critical significance.

Implementation of number portability requires CMRS carriers to interconnect with LEC networks.<sup>12</sup> Number portability will require the establishment of several number portability databases that must be queried each time a call is initiated to a portable number. Under the Commission's rules, all numbers, both wireless and wireline, must be portable in accordance with the Commission's specified implementation plan. Due to the staggered implementation dates of number portability, wireline systems will implement number portability before wireless systems.<sup>13</sup> During that interim period, however, if CMRS carriers wish to complete calls to portable numbers, they will be required to interconnect with and deliver traffic to wireline systems to conduct the necessary queries. Initially, then, CMRS carriers will be dependent on the LECs to perform the queries necessary to route and terminate calls to portable numbers. In fact, even when full number portability is in effect, CMRS carriers may continue to depend on the wireline networks to perform the query functions in light of the cost of performing this function on its own, in comparison to the number of queries that may be required of the wireless system.<sup>14</sup>

The linking of the LEC query capability with the CMRS carrier's system, then, plays an integral role in the routing and termination of wireless calls. The court specifically upheld the Commission's rules governing pricing arrangements for transport and termination of traffic between LECs and CMRS providers. In doing so, the court recognized that Congress provided express authority to the Commission to regulate LEC-CMRS interconnection under Section 332(c)(1)(B), as well as the authority to regulate rates charged by CMRS providers. The rates charged for all number portability costs, including Type 2 costs, should be governed by the Commission's express authority to regulate LEC-CMRS interconnection, as confirmed by the Eighth Circuit, in addition to its authority under Section 332 over rates charged by CMRS providers in general.

The Commission also should note that wireless services are inherently conducive to interstate regulation. First, the nature of wireless services, whose license areas are not confined to geopolitical boundaries like the traditional wireline services, makes it impossible to separate the interstate and intrastate components of CMRS regulation. Second, given the inherently interstate nature of the wireless industry, combined with the

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<sup>12</sup> The Commission has determined that the term interconnection refers to the physical linking of two networks for the mutual exchange of traffic. Interconnection Order at ¶ 26.

<sup>13</sup> See discussion *supra*.

<sup>14</sup> Note that number portability must be implemented in only the top 100 MSAs where a request has been made by June 1999, and any areas where a request has been made thereafter. However, even the most rural markets must support number portability in a roaming environment and, thus, must be able to conduct the necessary queries or enter into arrangements with another carrier to make the queries so that users can complete calls to portable numbers.

Commission's explicit authority to regulate rates for CMRS, state regulation would negate the Commission's clear authority under Section 332 over interstate communication.<sup>15</sup>

## UNBUNDLED ACCESS

The court's affirmation of the Commission's rules governing unbundled access to network elements also indicates that number portability functions constitute an important aspect of interconnection and should therefore be governed by Federal rather than State regulation. The court affirmed the Commission's determination that incumbent LECs must provide competitors with unbundled access to operational support systems ("OSS").<sup>16</sup> OSS functions consists of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information."<sup>17</sup>

Access to number portability databases and query functions will be necessary to identify the called party when a call to a wireline system is initiated from a wireless phone. Because identification of the called party is crucial to the billing of a wireless call, the number portability function of a network constitutes a key component of the billing function. This function, then, constitutes a legitimate OSS function to which, under the Commission's rules as affirmed by the Eighth Circuit, LECs must provide wireless carriers unbundled access.<sup>18</sup>

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<sup>15</sup> These indisputable facts also support the argument that the Commission has an alternative basis for federal jurisdiction over intrastate communications under the "impossibility exception" to Section 2(b). The impossibility exception allows Commission preemption of State regulation of intrastate communication when "(1) it is impossible to separate the interstate and intrastate components of the Commission regulation and (2) the state regulation would negate the Commission's lawful authority over interstate communication." *Iowa Utilities Board* at 107.

<sup>16</sup> See *Iowa Utilities Board* at 130.

<sup>17</sup> 47 C.F.R. § 51.319(f) (emphasis added).

<sup>18</sup> Moreover, the number portability functions meet the statutory criteria of Section 251(d)(2), which constitute the relevant factors used in determining what network elements should be unbundled. Under these guidelines, ILECs must provide unbundled access to network elements if (1) failure to provide access to the network element impairs the ability of the carrier seeking access to provide services, and (2) if access to the network element is proprietary, the element is necessary. 47 U.S.C. § 251(d)(2). The court affirmed the Commission's interpretation that a carrier's ability to provide service would be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." Interconnection Order at ¶ 285. Clearly, absent access to the number portability functions, quality of the service offered by a wireless carrier would decline because it would be

Under the Commission's rules, as affirmed by the court, access to number portability functions of LEC networks is an essential aspect of LEC-CMRS interconnection. As discussed above, the court has clearly ruled that the Commission has authority over LEC-CMRS interconnection, and particularly over the rates charged for LEC-CMRS interconnection.

## **CONCLUSION**

The Eighth Circuit's decision compels a fundamental review of Section 332 and its jurisdictional scope, and should inform the Commission's decisions in matters affecting the wireless industry. Most immediately, the court's decision that Section 332 grants the Commission plenary authority over entry and rates charged by CMRS providers gives the Commission broad authority to exert Federal jurisdiction over all aspects of wireless number portability cost recovery. Given the interstate nature of wireless services and the clear authority of the Commission to regulate CMRS rates and entry regulation, it is inappropriate for the States to regulate rates for CMRS number portability cost recovery. Rather, the Eighth Circuit has made clear that number portability cost recovery for CMRS must be established by the Commission.

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unable to complete calls to ported numbers. Because access to this function is not proprietary in nature, the first prong of whether access is necessary need not be explored.